A three-fold struggle over neutrality

A Three-fold Struggle over Neutrality: The American Experience in the 1930s

by

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The inter-war period is perhaps the most instructive in history of neutrality, at least from the legal standpoint. For one thing, the establishment of the League of Nations raised the most fundamental question of all: whether neutrality could serve any purpose at all in the new age of collective security. Some persons argued forcefully that it could not. Foremost among them was the Greek scholar and diplomat Nicolas Politis. Neutrality, in his opinion, may have been suitable for a world in which war, which was regarded in cold Realpolitik terms as an accepted feature of international life but was now obsolete in the new age of international solidarity and war prevention.

> [T]oday [Politis pronounced] neutrality appears to be a true anachronism; being no longer in harmony with the status of the law of nations or with the economic necessities and aspirations of the nations, it is, as an institution, irrevocably doomed; it is destined to disappear.[1]

The new trend, held Politis, was for the nations of the world to join together in the active pursuit of international peace. In that grand cause, neutrality could only be seen as an impediment, a shirking of responsibility. For that reason, Politis held neutrality to be "more of

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[1] Nicolas Politis, Neutrality and Peace (Francis Crane trans.; Washington, D.C.: Carnegie Endowment for International Peace, 1935), at xiii.

an evil than a good, because the attitude of disinterestedness happens, things being what they are, to favour war."[2] The way forward was clear: neutrality must be "deliberately abandoned."[3]

Such was the hostility to the very idea of neutrality that James Brierly, the prominent professor of international law at Oxford University, strenuously objected in principle to the effort by the International Law Association to undertake a codification of the law of neutrality, contending that it was a reactionary step.[4] His counterpart at Cambridge University, Arnold McNair, agreed, finding the idea of codifying this area of law "utterly repugnant."[5] The noted French lawyer Alphonse de La Pradelle was also of this view.[6]

This principled opposition to neutrality did not go unchallenged. Nowhere was the debate on the subject more vigorously conducted than in the United States – a country with a long and proud history of neutrality. In both the legal academic world and the political arena, a vigorous contention took place between three competing visions of the future of neutrality. One may be termed the collective-security school. In the spirit of Politis, this group favoured strengthening the collective-security machinery of the League of Nations – or alternatively some effective substitute for it – even if that meant substantially or entirely dispensing the with the law of neutrality altogether. A second group may be called the traditional-neutrality school. Their primary goal was an insistence on neutrals retaining the full range of rights accorded them by the traditional law of neutrality, as it had evolved up to 1914 – while at the same time insisting that neutrals must correspondingly scrupulously adhere as well to the full range of duties which that law imposed on them. Finally, there was a group sometimes known as the "new neutrality" school. Their dominant purpose was, in essence, to minimise, to the greatest extent possible, the risk of future American involvement in such a general war.

The story of the intellectual and political sparring between these three groups deserves to be better known than it is, if only because the competing visions are with us to the present day. The following discussion is a brief survey of the stimulating, and high-stakes, debate which raged in the United States in the 1930s.

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2 Id. at 42.
3 Id. at 83.
4 Report of the 37th Conference of the International Law Association (London: Eastern Press, 1932), at 175-77.
5 Id. at 186.
6 Id. at 187.

The Context

It is important to appreciate how heavily the shadow of history fell upon these debates, in two different ways. For one thing, the American experience with neutrality in the Great War was very much on the minds of all of the participants in these debates – though (as will be seen) with greatly differing lessons being drawn from that experience. In addition, the three contending schools may be seen to match, with uncanny accuracy, a similar three-way debate which had taken place in the second half of the Eighteenth Century, when the law of neutrality began to be placed, for the first time, onto an explicit doctrinal basis in the emerging science of international law.

The Eighteenth-Century debate over neutrality

The law of neutrality presents the most striking example of the manner in which a body of law can emerge out of practical needs and experiences, without the benefit of any underlying conceptual foundation. One of the important developments was the articulation of some basic rules about the seizure of goods at sea in time of war, set out in the Catalan Consolato del Mare, dating from (probably) the Thirteenth Century, with a printed text dating from the end of the Fifteenth Century. It set out what may be called a character-of-the-cargo rule to govern seizures. This meant that a belligerent power could seize private property belonging to nationals of its enemy, regardless of where that property was found – i.e., that enemy property could be taken from neutral ships. Conversely, if an enemy merchant ship was captured and

was found to be carrying some cargo belonging to nationals of a neutral state, then that neutral property could not be taken.[7]

In the course of time – basically from the early Seventeenth Century – treaty practice among the major European maritime powers made an important modification of the Consolato's rules. With the notable exception of England, the powers generally agreed, by way of a network of bilateral treaties, that a rule of "free ships make free goods" would be adopted instead of a character-of-the-cargo approach.[8] This meant that enemy-owned property would be safe from seizure if it was being carried on a neutral vessel. (The neutral flag would "cover" the enemy cargo, in the common legal parlance.) No explicit rationale was given for this new approach. It was simply stated in the treaties.

There were, however, two important express exceptions to this "free ships-free goods" rule: contraband of war and blockades.[9] If the enemy-owned goods that were being carried on a neutral ship consisted of materials that were to be used in the carrying on of the war (i.e., contraband of war), then those goods could be taken, though only by means of a judicial process. The neutral ship, with its cargo, would be taken to a port of the capturing power, where the matter would be brought before a prize court, which would adjudicate whether the goods in question actually fell into the category of contraband (e.g., arms and ammunition). If they did, the contraband goods would be confiscated. (It would be "good prize" in the legal jargon.) The position was much the same for cases of blockade-running by neutral ships. If a neutral ships was suspected of attempting to run a blockade, then it would be brought before a prize court. If the violation were held to be established, then the entire cargo would be good prize, along with the ship itself. For these two key exceptions to the "free ships-free goods" rule, there was also no explicitly stated rationale. There were simply the treaty provisions.

It was only in the second half of the Eighteenth Century that treatise writers began to discuss the reasons for these rules. Regarding the "free ships-free goods" rule, some contended that this should be regarded as a logical consequence of the foundational principle of state sovereignty. On this argument, a neutral ship (or any ship for that matter) should be seen as a

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7 Stanley S. Jados, The Consulate of the Sea and Related Documents (University, Alabama: University of Alabama Press, 1975), sec. 276, at 191-94.

8 Stephen C. Neff, The Rights and Duties of Neutrals: A General History (Manchester: Manchester University Press, 2000), at 29-32.

9 Id. at 32-35.

piece of floating territory of the state whose flag it flew. And just as one state has no legal right to intrude into the territory of another without consent, so no state has a legal right to capture a vessel flying the flag of another state without that state's consent.[10] A problem with this argument was that it seemed to prove too much. It would seem to bar a belligerent state from capturing a neutral ship even in the cases of contraband carriage and blockade-running. It was over this issue that the early doctrinal debates took place.

First in the field was the Swiss publicist Emmerich de Vattel, who dealt with the matter, albeit only very briefly, in his famous treatise on The Law of Nations of 1758 (as the Seven Years War was raging).[11] Vattel defended the right of belligerent powers to capture contraband of war from neutral ships. Furthermore, he provided an explicit rationale for that right. The rationale was the principle of necessity.[12] This is a general principle of international law, explicitly recognised in present-day international law, to the effect that a state is entitled to violate the legal rights of other states in order (in the present-day formulation) "to safeguard an essential interest" in the face of "a grave and imminent peril."[13] In the case of a state which is at war, the "essential interest" is, of course, achieving victory in the armed struggle, and the "grave and imminent peril" is the frightening prospect of defeat.

This necessity theory, as it will be termed, has the neat intellectual advantage of conceding, in principle, the basic point that a neutral ship is equivalent to the sovereign territory of the neutral, while at the very same overriding, or trumping, that principle by means of a higher-level principle of necessity. The neutral trader and carrier, on this view, is facing only the loss of profit from an arms sale, plus the inconvenience of delay in the voyage; whereas the belligerent captor is, virtually by definition, fighting for its very life. The more important interest should prevail over the less important one.

Vattel's necessity theory was very quickly contested, however, by a Danish lawyer named Martin Hübner, in book entitled De la saisie des bâtiments neutres published in 1759.[14]

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10 Id. at 90-91.

11 Emmerich de Vattel, The Law of Nations, or the Principles of Natural Law (Charles G. Fenwick trans.; Washington, D.C.: Carnegie Institution, 1916 [1758]).

12 Id. at 272-78. See also Neff, Rights and Duties of Neutrals, at 45-48.

13 International Law Commission, Draft Articles on State Responsibility, art. 25, in Report of the International Law Commission on the work of its Fifty-third session, General Assembly Off. Rec., Supp. 10, 56th sess., UN Doc. A/56/10 (2001), at 49.

14 Martin Hübner, De la saisie des bâtiments neutres; ou, le Droit qu'ont les nations belligérantes d'arrêter les navires des peoples amis (2 vols.; The Hague, 1759). See also Neff, Rights and Duties of Neutrals, at 48-51.

This was, incidentally, the first book devoted to neutrality issues. Hübner conceded the right of belligerents to capture contraband of war from neutral ships, but on an importantly different line of reasoning. He advanced what may be termed a code-of-conduct approach to the question. He was concerned that a necessity-based argument, such as that of Vattel, gave too much leeway to belligerents at the expense of neutrals. It gave a broad, and elastic, license to belligerents to take whatever action was necessary under the circumstances to prevent its war effort from being impeded – with neutrals simply being left with whatever was "left over." In other words, a necessity theory, by its nature, is clearly biased in favour of belligerent parties and against neutral ones.

The true position, Hübner insisted, is that international law makes a sharp delimitation between the rights of belligerents on the one hand, and of neutrals on the other. Each of these parties is entitled to exercise the full range of its rights, without regard to what material effect it might have on the other. By the same token, there is to be no "trespassing" by either party into the juridical territory of the other, no matter how dire an emergency might be present. There can, of course, be room for argument as to precisely what the contents of this code of conduct are – but the basic principle, to Hübner, is that the rules (or code of conduct) are what they are and must be scrupulously obeyed by all parties, with no special license for emergency action.

It may be noted this code-of-conduct, in contrast to Vattel's necessity theory, is not intrinsically biased towards either belligerents or neutrals. Which party fares better in this system depends critically on what the contents of the code of conduct happen to be. The contents of the code, in Hubner's view, are customary in nature, hammered out of the raw material of state practice, and of the general consensus of the major maritime states, over the course of many years. Crucial evidence of the contents of the code can be gleaned from the contents of the various bilateral treaties, but only with due care because treaty rules might represent departures from the underlying customary law. But it is that underlying customary law which will govern all situations which are not provided for by treaty.

The third approach to the question came several years later, in 1781, from the pen of an Italian writer named Ferdinando Galiani.[15] This was the first treatise to give a comprehensive treatment of the whole of the law of neutrality. Galiani was commissioned to undertake this historic task by the Grand Duke of Tuscany, who had a policy of firm neutrality in the various European wars which swirled around his small state. It is therefore perhaps not surprising that Galiani produced an oeuvre which was biased in the interest of neutral states. It may be called the community-interest approach to the law of neutrality because it sought to resolve contested questions about the law of neutrality by looking to the interest of the broader international community at large, rather than of the particular belligerent and neutral parties involved in a particular dispute. This view was founded on the thesis that the interests of those at peace should, as a matter of general principle, prevail over the interests of those at war. Consequently, the position should be that neutral states retain their ordinary peacetime rights in full, even when other states go to war. The simple fact of being involved in a war should not confer any additional rights onto belligerent parties vis-à-vis neutrals.

For present purposes, it will suffice to say that, in the course of the Nineteenth Century, the code-of-conduct school of thought gained the upper hand over the other two. Its definitive summation came at the very end of the Nineteenth Century, at the hand of the Swedish lawyer Richard Kleen.[16] Some of its more important rules found their way into the various conventions drafted at the Second Hague Peace Conference in 1907, particularly the conventions on Neutrality in Land War and Neutrality in Maritime War.[17] Further important progress was made in clarifying the rules in the Declaration of London of 1909, which resolved a host of outstanding questions, many relating to those two longstanding and thorny subjects of contraband and blockade.[18]

Notwithstanding this impressive degree of codification, this mature law of neutrality was something of an intellectual hodge-podge. It was a highly detailed menu of rules which had evolved from centuries of state practice, but for which there was no clear guiding thread.

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15 Ferdinando Galiani, De' Doveri de' Principi Neutrali verso i Principi Guerreggianti, e di Questi verso i Neutrali (Naples, 1782). See also Neff, Rights and Duties of Neturals, at 51-52.

16 See generally Richard Kleen, Lois et usages de la neutralité d'après le droit international conventionnel et coutumier des Etats civilises (2 vols; Paris: A. Chevalier-Marescq, 1898-1900).

17 Hague Convention V on the Rights and Duties of Neutrals in Land War, Oct. 18, 1907, 205 C.T…S 299; and Hague Convention XIII on the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 205 C.T.S. 395.

18 Declaration of London, Feb. 26, 1909, 208 C.T.S. 338.

Compromise and arbitrariness held a powerful sway in effectuating a rough and ready balancing of the competing interests of belligerents and neutrals. It was this corpus of law which was in force at the commencement of the Great War in 1914 and which accordingly formed the basis of various disputes about neutrality issues which arose during that conflict.[19] Debate over the lessons from that conflict formed the immediate backdrop to the disputes that erupted in the 1930s.

American neutrality in 1914-17 and its lessons

A shadow which loomed very large over the neutrality debates of the 1930s was the experience of the United States as a neutral during the Great War, in the period 1914-17. Prior to that, the United States had a long and proud history as a neutral power, and consequently as a resolute champion of the rights of neutrals generally. It even had the distinction of having gone to war in 1812 against a major European power in order to uphold its rights as a neutral during the French Revolutionary struggles of the time. History repeated itself, at least in a manner of speaking. When the United States entered the global fray in 1917, it was in direct response to the German policy of unrestricted submarine warfare, i.e., the policy of sinking neutral ships as well as enemy ones if they were found to be trading with the Allied powers.[20]

In the aftermath of the conflict, critical voices began to emerge.[21] Involvement in the war was increasingly seen as having been an error on the country's part. But there was disagreement over what the fault had been. Some were inclined to blame special interests, whose selfish and greedy actions had dragged the country into war. In particular, suspicions were voiced against two groups: arms exporters and financiers. In a less conspiratorial vein, some alleged that the American insistence on the rigorous upholding of its rights as a neutral was at fault, and that a decision to go to war should be have been made (or decided against, as

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19 See Neff, Rights and Duties of Neutrals, at 145-65.

20 See generally Ernest R. May, The World War and American Isolation 1914-1917 (Cambridge, Mass.: Harvard University Press, 1959).

21 For a general account of these debates, see generally Warren I. Cohen, The American Revisionists: The Lessons of Intervention in World War I (Chicago: University of Chicago Press, 1967).

the case may be) on the basis of broader questions of the country's over-all national interest, instead of on the basis of arcane legal quibbles. Adherents of this view became supporters of what would be called the "new neutrality" thesis of the 1930s.

Some read the opposite lesson from the experience of 1914-17. These were persons who insisted that the problem was not that the United States had been too stubborn in its defence of its neutral rights, but rather that the its policy had not been truly neutral at all. It had been, in reality, squarely directed in favour of the Allied side and against Germany. In particular, the United States cravenly acquiesced in British economic-warfare measures while at the same time taking very strict positions against any German infringements of its neutral rights. In addition, American lending, undertaken on a massive scale, had gone virtually entirely to the Allied side.[22] It was therefore hardly surprising that Germany decided to take the actions which brought the United States formally into the conflict. "We were unneutral and we paid the cost," was the crisp summation of one of the leading figures of this viewpoint, Edwin M. Borchard of Yale Law School.[23] Adherents of this view became the proponents of what will be termed the traditional-neutrality school of thought.

These debates from the Eighteenth Century and the post-1918 period formed the backdrop to the disputes that divided international lawyers in the United States during the 1930s.

The Three Rival Neutralities – The Old, the "New" and the Obsolete

As the danger of a second world war became ever more menacing, it is natural that American minds became increasingly concerned over what the country's neutrality policy

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22 See Edwin Borchard and William Potter Lage, Neutrality for the United States (London: Oxford University Press, 1937), at 33-44.

23 Id. at 34.

should be in the event of another general European war. It was generally envisaged that the United States would not actually enter such a conflict. But there the agreement stopped, and the three competing camps formed: the collective-security group, the "new neutrality" partisans and the champions of traditional neutrality.

The collective-security school

At the core of the collective-security position was the view that neutrality could still survive in the modern world, in the sense that states would still be able to refrain from participating in wars which broke out. But neutrality should no longer be governed, as in the past, by a strict principle of impartiality. Instead, it should be integrated with the concept of good global citizenship.

In the United States, the view was expressed famously by Henry Stimson, who served as secretary of state in the Hoover administration.[24] He was converted to the collective-security cause by the Japanese occupation of Manchuria in 1931 and became an active spokesman for it after leaving office in 1933. Where the legal approach to war had once been a matter of strict impartiality and legal equality between the contending parties – coupled with scrupulous non-involvement and impartiality on the part of neutrals – Stimson insisted that that this could no longer be so.

> Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers. . . . We no longer draw a circle about them and treat them with the puntilios of the duelist's code. Instead we denounce them as lawbreakers.[25]

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[24] See, for example, Henry L. Stimson, "Neutrality and War Prevention," 312 Int'l Conciliation 347-57 (1935).

[25] Quoted in Robert A. Divine, The Illusion of Neutrality: Franklin D. Roosevelt and the Struggle over the Arms Embargo (Chicago: University of Chicago Press, 1962), at 19.

Among academic international lawyers, the foremost American champion of this approach was Quincy Wright, of the University of Chicago. Other proponents of this general way of thinking included Manley Hudson of Harvard Law School, Clyde Eagleton of New York University Law School, Charles G. Fenwick of Bryn Mawr College, James Shotwell of the Carnegie Endowment for International Peace, Nicholas Murray Butler, the president of Columbia University and Nobel Peace Prize winner, and Newton Baker, a former secretary of war and Wilsonian internationalist.

Like Politis, Wright contended that traditional neutrality was only a meaningful concept in conflicts in which the belligerents were legal equals. But we no longer live in such a world. Now, war which occurs anywhere in the world is the concern of the world at large – as expressly stated in the Covenant of the League of Nations.[26] Traditional neutrality, in Wright's view, amounted to a shirking of the duties of global good citizenship – and even to the actual encouragement of aggression, since neutrality precluded the providing of assistance to victim countries.

> Far from discouraging war [Wright asserted], neutrality . . . has tended to encourage aggression of the strong against the weak. Far from assisting states to keep out of war, neutral rights have themselves provided the basis for disputes which have drawn non-participants into war.[27]

The single most conspicuous plank of the collective-security programme was the idea that neutral states should be allowed – or even required – to show partiality against aggressor states and in favour of victims of aggression. Politis candidly maintained that neutral states "could . . . depart from the duty of impartiality" in the interest of promoting the international community's broader goal of peace and security.[28] He contended that an aggressor belligerent could have no right to complain of unneutral acts which benefitted its victim – and conversely, that neutral states could have to right to complain if their traditional neutral rights were infringed by the victim state and its supporters.[29]

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26 League of Nations Covenant, art. 11.
27 Quincy Wright, "The Present Status of Neutrality," 34 Am. J. Int'l L. 391-415 (1940), at 409.
28 Politis, Neutrality and Peace, at 47.
29 Id. at 47-50.

Further ammunition for the collective-security advocates was provided by the adoption of the Pact of Paris (or Kellogg-Briand Pact) in 1928, in which states parties (including the United States) foreswore resort to war as "an instrument of national policy."[30] Although the Pact contained no explicit enforcement provisions, the thesis was advanced that any state breaching the Pact would thereby be committing a violation of international law, with the consequence, as a matter of general international law, that other parties to the agreement thereby became automatically entitled to institute sanctions (or countermeasures in present-day parlance) against it. These sanctions could take the form of the adoption of preferential policies in favour of a state that was a victim of the violation. In 1934, the Institute of International Law explicitly endorsed this position.[31]

In this same general vein, a research programme in the 1930s based at Harvard Law School produced, in 1939, a draft Convention on the Rights and Duties of States in Case of Aggression.[32] This was drawn up under the auspices of Philip C. Jessup of Columbia Law School. It pointedly refrained from even using the word "neutral," but nonetheless provided, in essence, that non-belligerent states would be entitled, vis-à-vis an aggressor state, to all of the rights of a neutral but would be relieved from all of the duties of neutrality. Aggressor states would therefore have no right to enforce blockades against neutral states, or to capture and confiscate contraband war being carried to their enemies.

The "new neutrality" emerges

Opposition to traditional neutrality was not a monopoly of the collective-security advocates. A rival reform programme was offered by the proponents of what was sometimes

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30 Pact of Paris, Aug. 27, 1928, 94 L.N.T.S. 57.

31 Briand-Kellogg Pact of Paris (August 27, 1928): Articles of Interpretation as Adopted by the Budapest Conference, 1934 (London: Sweet and Maxwell, 1934). See also Hersch Lauterpacht, "The Pact of Paris and the Budapest Articles of Interpretation," 20 Transactions of the Grotius Society 178–206 (1935).

32 Draft Convention on the Rights and Duties of States in Case of Aggression, 33 (Supp.) Am. J. Int'l L. 827-30 (1939), with commentary at 844-909.

called the "new neutrality." Its leading champion was a professor at Harvard Law School named Charles Warren.

Warren's "new neutrality" stance was unveiled at the 1933 annual meeting of the American Society of International Law[33] and then expounded in fuller form the following year in an article in Foreign Affairs.[34] The "new neutrality" position may be characterised, in broad terms, as a programme for ensuring that a neutral state was not pulled into a war against its own national interest. The primary means for ensuring this would be to refrain from insisting on the enforcement of its full range of traditional neutral rights. A neutral state's foremost interest lay in making sure that it stayed out of war. And if some – or even most or all – of the traditional neutral rights had to be sacrificed to ensure this, then that was a price that, realistically, would have to be paid.

A key consideration underlying the "new neutrality" position was the belief that, in reality, impartiality – that cornerstone principle of traditional neutrality -- was an impossible goal. Even policies that were even-handed on their face would virtually never be so in their material effects, because one side would inevitably benefit from the policy more than the other. For example, during the Great War, belligerent warships of both sides had been allowed to enter American ports – but the policy, in practice, exclusively benefitted the Allies because German ships were bottled up in Europe by Allied blockades. By the same token, assertions of neutral rights would, in reality, affect the belligerents unequally. The point was pithily made by the prominent journalist and commentator Walter Lippmann:

> To assert the freedom of the seas . . . is to take sides against the nation which has sea power; not to assert the freedom of the seas is to take sides with the national which has sea power. In either event neutrality in any effective sense of the term has vanished.[35]

The more sensible policy, in Warren's opinion, is for a neutral state to reduce all contacts with all belligerents to the greatest extent feasible. The single most important step in this direction would be a prohibition against arms sales to any belligerents once a war broke

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[33] Charles Warren, "What Are the Rights of Neutrals Now, in Practice?" 27 Procs. Am. Soc. Int'l L. 128-34 (1933).

[34] Charles Warren, "Troubles of a Neutral," 12 Foreign Affairs 377-94 (1934). See also Charles Warren, "Prepare for Neutrality," 24 Yale Rev. 467-78 (1935).

[35] Walter Lippmann, "Mr Walter Lippmann's Proposals," 17 Naval Rev. 274-80 (1929), at 275.

out. Warren also proposed that American nationals should be barred from travelling on ships that carried arms. The reason was that such ships were subject to being sunk (as the Lusitania had been) – and an outcry over the deaths of American nationals might be a force propelling the country towards entry into the war. The United States, in Warren's view, should also bar armed vessels of all belligerents from entering its ports. In addition, he favoured prohibiting the public flotation of loans to belligerents in the United States. He conceded, though, that private loan arrangements should be allowed to continue, as barring those would be involve too great an economic sacrifice for the American economy.[36]

A key feature of the "new neutrality" position was an intense opposition to war profiteering on the part of neutrals. In Warren's view, neutral states should be permitted, during war, to continue their normal pre-war pattern and level of trade with either or both belligerents, but not to increase it. "It is better," asserted Warren, "that our citizens should run the risk of commercial loss than that the country should be involved in a war to protect their alleged commercial rights."[37] If the country, or the government, was actually concerned over economic loss caused by the foregoing of traditional legal rights, then the rational policy would be for the government itself (i.e., the country at large) to provide that compensation, rather than for the United States to plunge into war.

The "new neutrality" position won support from a number of prominent international lawyers. Among them was Herbert Briggs of Columbia Law School.[38] Another supporter was James Wilford Garner of the University of Illinois.[39] It also had the support of the prominent historian Charles Beard, who derided historic neutral rights as "a mere fiction," and their defence in war-time as "a warlike measure."[40] The most prominent recruit was James Brown Scott, the long-serving editor of the American Journal of International Law and leading light in the American Society of International Law.[41] Scott had also chaired the Neutrality Board of the Department of State during the Great War.

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36 Warren, "Troubles of a Neutral."

37 Id. at 391.

38 29 Procs. Am. Soc. Int'l L. 84-86 (1935).

39 27 Procs. Am. Soc. Int'l L. 148-49 (1933).

40 Charles A. Beard, The Open Door at Home: A Trial Philosophy of the National Interest (New York: Macmillan, 1935), at 285-86.

41 See James Brown Scott, "The Neutrality of the Good Neighbor," 29 Procs. Am. Soc. Int'l L. 1-11 (1935).

The traditional neutrality school

Ranged against both of these sets of plans for the modification of the law of neutrality were those who insisted on the retention, and vigorous defence, of that law as it had evolved to the eve of the Great War. The foremost spokesmen for this group were John Bassett Moore and Edwin Borchard. Moore had been a prominent professor of international law at Columbia Law School, and then a judge of the newly established World Court. Borchard was a former student and protégé of Moore. Another prominent figure in this camp was Lester H. Woolsey of American University (who was also a prominent practitioner in international law).[42] Moore and Borchard were both harsh critics of the American neutrality policies of 1914-17, protesting that the United States had not been, in reality, truly neutral in the Great War. Rather, its policies had been heavily biased towards the Allied side – with the Germans thereby being, in essence, provoked into the drastic step of unrestricted submarine warfare.

Borchard was fully aware of the historically contingent character of the substantive law of neutralit, of which he was so staunch a defender, candidly describing it as "a fairly definite compromise between the . . . conflicting and irreconcilable claims of the belligerent to stop all trade with his enemies, and of the neutral to continue freely to trade with both belligerents." This compromise, he conceded, was "founded not on logic but on agreement."[43] But that was not seen as a weakness of the law. On the contrary, the very fact that the traditional law of neutrality was rooted in agreement, rather than in some kind of hypothetico-deductive reasoning from first principles, meant that states are not free to overthrow it at will. The law of neutrality may be essentially contractual in nature. But contracts are legally binding. They can, of course, be altered by later agreement among the parties; but until that happens, the law stands as agreed.

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42 See Lester H. Woolsey, "The Fallacies of Neutrality," 30 Am. J. Int'l L. 256-62 (1936).

43 Edwin M. Borchard, "Restatement of the Law of Neutrality in Maritime War," 22 Am. J. Int'l L. 614-20 (1928), at 616.

Moore and Borchard insisted that scrupulous adherence to the law of neutrality was the best guarantee of peace – at least for the neutral state itself. Moore contended that neutrality "has always had . . . the highly moral and expedient object of preventing the spread of war."[44] In the same vein, Borchard lauded traditional neutrality as being humanitarian and peace-preserving because it served to limit the impact of war on third states and to enable peaceful states to carry on their lives with a minimum of disruption. For this reason, neutrality should be recognised as "one of the beneficent achievements of a long struggle with barbarism."[45]

The Schools in Contention

During the 1930s, contention raged between the partisans of these three rival schools of thought – first in the pages of scholarly journals and the conference rooms of the American Society of International Law, and then in the halls of the United States Congress. Before looking at these battles, though, it is useful to note that the three were clear and direct descendants of the three contending viewpoints that had emerged (as noted above) in the late Eighteenth Century.

The past as present

The "new neutrality" of Warren and his followers was clearly the direct descendant of Vattel's necessity thesis. It was noted above that that thesis, in effect, gave priority to the interests of belligerents over those of neutrals, with the so-called "rights" of neutrals being, in reality, merely the residue that was left after the belligerents had taken the measures that were necessary to further their war efforts. Warren was of the same view, expressly deriding

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44 John Bassett Moore, "An Appeal to Reason," 11 Foreign Affairs 547-88 (1933), at 562.

45 Edwin M. Borchard, "The 'Enforcement' of Peace by 'Sanctions'," 27 Am. J. Int'l L. 518-25 (1933), at 523.

neutrality rights as "a legal fiction."[46] He frankly contended that what were commonly labelled as neutral rights were in reality merely "a concession, express or implied, on the part of the belligerent that if the neutral's acts did not impair too seriously the belligerent's chances of winning the war, the neutral would be allowed to do 'business as usual.'"[47] Belief in rights of neutrals, Warren insisted, was not merely misguided intellectually; it was downright dangerous as a basis for policy-making.

> [T]he sane policy for us [contended Warren] would be . . . to admit frankly that, whether or not 'rights' exist in law, it is impracticable to assert them successfully during the war, and that it is impracticable to wrest admission of them from a belligerent. . . . There is too much talk in international affairs about rights and too little about adjustments. Harping on rights leads to arrived-at position from which a nation cannot withdraw or yield; it leads to ultimatums which inevitably lead to war.[48]

Instead of asserting its supposed rights, neutrals should instead realistically size up their situation in each conflict as it occurs and negotiate with the belligerents over what sort of conduct will be allowed and what will not. The outcome of such negotiations will, inevitably, depend on the relative bargaining power of the parties in the particular circumstances rather than on some pre-existing, objective menu of rights and duties.

Just as obviously, the collective-security standpoint was the modern-day version of Galiani's community-interest approach. The only difference was that, in the inter-war period, there was an actual international institution designed to represent the interest of the international community at large – the League of Nations. But, as noted above, the collective-security approach did not actually depend on the existence or effectiveness of the League itself. The proposed Convention for the Assistance of Victims of Aggression, for example, was designed to operate outside the League framework. In all events, though, the essence of the collective-security, or community-interest, position remained the same now as it had in the age of Galiani: that the welfare of the broader international community at large should prevail over the parochial rights and duties of <u>both</u> belligerent <u>and</u> neutral states.

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46 Warren, "Troubles of a Neutral," at 386.
47 Warren, "What Are the Rights," at 128.
48 Warren, "Troubles of a Neutral," at 389-90.

Finally, it is most apparent of all that the traditional neutrality stance of Moore and Borchard and their followers was an explicit continuation of the code-of-conduct approach to neutrality. As such, it was the most legalistic of the three, in the everyday sense of that word. It held that, so long as the rules of the law of neutrality were scrupulously adhered to, in all of their detailed sinuosity, belligerents could have no ground for complaint, and neutrals need have no fear of being pulled into a conflict against their will. In this spirit, Borchard spoke out in favour of proposals for a full and systematic codification of the law of neutrality, to assist in the resolution of any future disputes that might arise in the area.[49]

One feature shared by all three groups was the importance of learning the lessons from the difficult experience of 1914-17. They disagreed, however, on what those lessons actually were. To the collective-security group, the lesson was that it was important to take the utmost care to ensure that an experience like that the Great War would not recur. To that end, would-be aggressor states should not be allowed to be confident that neutral powers would carefully treat them on a par with their victims. They should be on notice that even states not actually participating in the hostilities would adopt policies favourable to their foes. To the "new neutrality" proponents, the lesson was learned was the impossibility of adopting policies whose material effects would be truly even-handed – and, by extension, the illusory nature of the very idea of rights of neutrals. Such so-called rights, when asserted, always favoured one belligerent and correspondingly provoked hostility from the other. Therefore, the sensible policy was to withdraw from contact with the belligerents as much as possible. To the traditional-neutrality advocates, the lesson from 1914-17 was the importance of scrupulous and conscientious adherence to the established law of neutrality, and particularly to the core principle of the duty of impartiality. Provided that that was done, no belligerent could have any right to be aggrieved – and hence could have no legal ground for taking action and forcing the neutral into the conflict.

The debate rages

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[49] Borchard, "Restatement."

There has seldom, if ever, been so vigorous and lively debate among American international lawyers as occurred in the 1930s over the direction which the law of neutrality should take. The spokesmen for the three rival groups were talented polemicists who, in commenting on momentous issues of war and peace, did not hesitate to attack their opponents with gusto. At the same time, though, it will be noted that on certain issues, there was some room for accommodation of views, if only begrudgingly, between the contending factions.

The first major salvo came in 1933, with a broadside attack by Moore, in an article in Foreign Affairs, against the very concept of collective security.[50] Ideas of collective security, he grumbled, "have no visible moorings on earth or in the sky."[51] Such notions appeal only to "shallow dupes who . . . urge that we blindly don an imported livery of 'world service'" in order gallantly to purge the world of wickedness. The true, if unsettling, view is that war is an inevitable and unavoidable feature of international affairs. Therefore, the sensible policy is simply to decide, as each conflict arises, whether to join in or stay out. If the decision is made to stay out, then the ready-made code of neutrality law is right there to guide all parties. Collective-security ideas – or delusions – are moralistic, utopian schemes that should play no role in the hardheaded business of international law and relations.

Regarding the law of neutrality specifically, Moore asserted that claims of its obsolescence were "unsound in theory and false in fact," holding that state practice continued to recognise the validity of the traditional law.[52] Assertions that the law of neutrality no longer existed were, Moore contended, merely part and parcel of a broader campaign to align American foreign policy with the actions of the League of Nations.

Borchard was of the same persuasion. He too objected to the moralistic outlook of the collective-security advocates. War, he insisted, should not be seen in terms of right and wrong. Rather, it should be seen as a disease. And the best way of dealing with a disease is to prevent it from spreading. That is precisely the valuable role that traditional neutrality played, and should continue to play. Collective security was, in his opinion, mere "doctrinaire . . . political

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50 Moore, "Appeal to Reason."

51 Id. at 551.

52 John Bassett Moore, "The New Isolation," 27 Am. J. Int'l L. 607-27 (1933), at 620.

theology."[53] The idea of common action against aggressors was derided by Borchard as "a kind of emotional morality which enables indignation and violence to clothe themselves in the mantle of righteousness."[54] Far from looking towards the isolation or containment of war, collective-security policies sought to involve as much of the world as possible in every conflict. "It seems impolitic," warned Borchard, "to suggest or imply that wars will be sooner ended by converting local conflicts into wide and general wars."[55] He dismissed the Harvard Research's draft Convention on the Rights and Duties of States in Case of Aggression as "an evangelical expression of moral convictions" which was "non-legal in its connotations."[56] In short, insisted Borchard, "[t]he philosophy of minding your own business has not yet been improved upon as a way to peace, sanity and tolerable life."[57]

Two points about the traditional-neutrality advocates are worth noting. One is that their primary target was the collective-security school. Their opposition to the "new neutrality" group was not so fundamental. It was more of a difference about policy. So long as the "new neutrality" programme envisaged even-handed treatment of belligerents in war – as it did – it was not so deeply contrary to the received law of neutrality as the collective-security approach was. Abandonment of neutral rights was seen, to be sure, as a most unwise policy. But so long as it was done voluntarily by the neutral state itself, as proposed by Warren and his followers, it would not actually be an outright violation of neutrality, in the way that collective-security policies were.

The second point about the traditional-neutrality school is that it may be tempting to label it as "isolationist." This would, however, be justifiable only if one defines "isolationist" as meaning opposition to collective security. It should be appreciated that the traditional-neutrality advocates did not advocate isolationism in the sense of believing that the United States should cut itself off from the larger world. On the contrary, the traditional-neutrality people insisted on full American involvement with the world at large – merely maintaining that the rules of that involvement should be the traditional rules of international law as inherited

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53 Borchard, "Neutrality and Unneutrality," 32 Am. J. Int'l L. 778-82 (1938), at 778.
54 Edwin M. Borchard, "The Arms Embargo and Neutrality," 27 Am. J. Int'l L. 293-98 (1933), at 296.
55 Borchard, "Restatement," at 619.
56 Edwin M. Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," 34 Am. J. Int'l L. 690-97 (1940), at 696.
57 Edwin M. Borchard, "Sanctions v. Neutrality," 30 Am. J. Int'l L. 91-94 (1936), at 94.

from past centuries rather than some new-fangled and visionary rules which had never stood the test of time.

The label of "isolationist" could be applied with much greater justice to those in the "new neutrality" camp because they actually did favour, to a significant extent, a policy of withdrawal of the United States from world affairs in the event of a general war. More than the other two schools, it was an anti-war programme, designed to keep the United States safe – and isolated – in the face of war by foreign powers. The "new neutrality" was, accordingly, the most egoistic of the three contending groups.

For this very reason, the "new neutrality" drew the especially strong hostility of the collective-security advocates. Wright derided it as "storm-cellar neutrality."[58] Eagleton regarded it as the worst of the three contending alternatives, condemning it as a programme of "supine submission" to the wishes of belligerents, even if they are flagrant aggressors. As such, it amounts to a formula for "craven submission to the criminal." He saw it as a contemptible proposal "that we shut ourselves up within our own gates and pocket our losses and our pride."[59] In this attack, the traditional-neutrality advocates could – and did – readily join. Moore scornfully likened the "new neutrality" programme to a turtle retiring into its shell, denouncing it as "a gopher-like policy of seclusion."[60]

In certain other respects, though, the "new neutrality" and collective-security supporters could find common ground. The principal manifestation of this was a shared moralistic outlook. Both were receptive to the idea that traditional neutrality had a worryingly close relationship to war profiteering. By trading in contraband of war, neutrals could fatten their bank balances while feeding, and even prolonging, the conflict. From the collective-security perspective, this amounted to flagrant bad world citizenship, to deliberate and cold-hearted abdication of the overriding duty of states to cooperate with one another to reduce armed conflict and to defeat aggression when it occurred. From the "new neutrality" standpoint, stubborn insistence on the right to continue trading with belligerents during war, under grand claims of legal right, were a formula for luring the neutral power into the struggle once those

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58 Quincy Wright, "Repeal of the Neutrality Act," 36 Am. J. Int'l L. 8-23 (1942), at 15.
59 29 Procs. Am. Soc. Int'l L. 131-33 (1935).
60 Moore, "Pending 'Neutrality' Proposals," at 64.

so-called "rights" came under threat – and thereby forcing the neutral country as a whole into war for the benefit of a clique of greedy profiteers.

Similarly, it is readily seen that the traditional neutrality supporters and the "new neutrality" group could find much in common in a mutual hostility to the collective-security group. They were critical of the collective-security programme of involving (ideally) all states of the world in a continuing operation of global policing. This idea was seen as a utopian one without any proven track record of success. On the contrary, the collective-security ideal had failed spectacularly to prevent Japan from occupying Manchuria in 1931; and in 1935-36, it would fail even more spectacularly when Italy invaded and conquered Abyssinia. The traditional neutrality and the "new neutrality" advocates both agreed that the better solution was the isolation and containment of conflict.

Neutrality law-making

Insofar as any of the three rival schools could claim victory in policy-making circles in the 1930s, it was the "new neutrality" group. It is not difficult to see why this was so. It held out a seductive promise of a practical and realistic way of ensuring that the United States would not be drawn into a future general war. In the atmosphere of the 1930s, there was a widespread feeling that participation in the First World War had been a mistake, and that consequently the utmost care should be taken to avoid re-making that mistake in a future conflict. Collective security held out the worrying prospect that the country would be drawn into some kind of never-ending global campaign against aggressors (or supposed aggressors) in faraway lands where no American national interest was really at stake. Traditional neutrality carried the risk that, in vindicating breaches of legal rights, the country would be forced into war without the sort of broad consideration of over-all national interest that many held to be so essential.

The American political process being as it is, it is hardly surprising that the "new neutrality" programme came about not at a single grand, coherent stroke, but rather in a somewhat halting and piecemeal manner. An early indication of it was the enactment of the

Johnson Act in 1934 (named for its chief sponsor, Senator Hiram Johnson of California).[61] This law prohibited Americans from lending to any European countries which were in default in the repayment of outstanding loans, chiefly of course being loans made during the Great War. Since virtually all of the borrowers were in default, the law effectively barred American lending to European states altogether – and, importantly, served notice that, in the event of another European war, the United States would not be a source of financing for it, as had been the case in the previous conflict.

The single most prominent issue in the neutrality debates was the question of arms trading and the imposition of embargoes on that trading in the event of wars between other countries. On this key issue, the three camps divided with great precision. The "new neutrality" advocates favoured impartial arms embargoing, so that arms would stop flowing from the United States equally to both sides in the event war. The collective-security group was in favour of partial embargoes – i.e., of prohibiting the supply of arms to aggressor states, while permitting arms flows to victim countries to continue. Finally, the traditional-neutrality group opposed arms embargoes altogether, as a craven surrender of the rights of neutrals.

It should be noted, though, that, for both the traditional-neutrality group and the collective-security advocates, an impartial embargo figured as a second choice. For the collective-security group, if a discriminatory embargo was not possible, then an impartial embargo affecting both sides could be accepted, as it at least had the virtue of preventing the United States from prolonging the conflict by becoming an arms supplier to one side, or even to both. The worst choice, from this standpoint, was the laissez-faire one of allowing arms trading without limit. From the traditional-neutrality standpoint, if such a laissez-faire policy was not feasible, then an impartial embargo would be the next choice, because at least that would retain adherence to the key principle of impartiality. The worst of choices, from this standpoint, would be a discriminatory embargo, which would violate the cardinal neutral duty of impartiality and thereby constitute, in Borchard's words, "an unfriendly and hostile act of the greatest significance," tantamount to a declaration of war against the disfavoured state.[62]

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[61] Act of Apr. 13, 1934, 18 U.S. Code § 955, P.L. 73-151, 48 Stat. 574. See J. C. Vinson, "War Debts and Peace Legislation: The Johnson Act of 1934," 50 Mid-America 206-22 (1968).

[62] Borchard, "Arms Embargo and Neutrality," at 294.

So the concrete issue presenting itself in the 1930s in the United States was: what kind of embargo power, if any at all, should the Congress grant to the President? For advice on this question, the Department of State sought the advice of Warren. In August 1934, Warren duly produced a lengthy memorandum advocating a "new neutrality" approach to the matter. Its centrepiece was a recommendation that an impartial arms embargo be instituted when war broke out. President Franklin Roosevelt expressed strong interest, and the Department of State proceeded to draft legislation in accord with Warren's plan.[63] But opposition simmered within the Roosevelt administration. The Navy was strongly in favour of upholding traditional neutral rights. From the collective-security vantage-point came strong opposition from Norman Davis, a longstanding Wilsonian internationalist who later served as the American ambassador to the Geneva Disarmament Conference. Davis favoured a presidential power to impose partial embargoes, which would enable the United States to coordinate its policies with those of the League.[64]

In the Congress, however, the prevailing sentiment was in favour of a non-discriminatory embargo policy. That this was so was hardly surprising, given the fact, noted above, that a non-discriminatory embargo was the first choice of one of the factions (the "new neutrality" group) but also the second choice of both of the others. So, as a kind of least common denominator, the odds were somewhat stacked in its favour. Accordingly, the Neutrality Act of 1935 provided that, in the event of war, the president was required to impose a mandatory arms embargo against both sides. In addition, the president was given discretionary power to proclaim that American nationals who travelled on belligerent-flag vessels could only do so at their own risk.[65] That this foray into the territory of the "new neutrality" was only tentative is indicated by the fact that the law was of temporary duration, expiring in February 1936.[66] The chief impact of the new policy was on the conflict between Italy and Abyssinia. As luck, in combination with geopolitics, would have it, the impartial embargo that was imposed harmed Italy more than Abyssinia, since only Italy could realistically have imported arms from the United States in any event.

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63 Divine, Illusion of Neutrality, at 70-72.
64 Id. at 72-74.
65 Neutrality Act, Aug. 31, 1935, chap. 837, 49 Stat. 1081.
66 Divine, Illusion of Neutrality, at 117.

A Neutrality Act of 1936 was then enacted to replace the earlier one on its expiration. Now, however, the focus of debate had shifted to the question of exports other than armaments, with raw materials as the principal concern. On this issue, there was the same clear division among the three competing approaches. The "new neutrality" group, including Warren, Walter Lippmann and Walter Millis, favoured a grant to the president of the power to impose an impartial embargo on any and all exports. Traditional-neutrality supporters, chiefly Borchard, Moore and Senator Johnson, opposed such a power, as did representatives from states with substantial exports. On this point, the traditional-neutrality approach prevailed, although the mandatory arms embargo was re-enacted, along with the travel-restriction authority.[67] The result, therefore, was essentially simply a continuance of the 1935 law. It too had a built-in expiry date (of April 1937).

The next Neutrality Act, of 1937, contained a new element, popularly known as "cash and carry," which was a substitute for an embargo on non-contraband exports. Such exports would not be flatly prohibited. Instead, the president was empowered to designate a list of goods for which the belligerents would have to pay cash (i.e., loans from Americans would not be allowed), and which the belligerents would have to transport in their own vessels. The idea, then, was that the United States would function only as a sort of passive dispensary of raw materials, but could not actually facilitate either their purchase or their transport. The practical effect of the plan, it was envisaged, would be, de facto, to reduce the flow of materials to belligerents by virtue of the difficulty that the belligerents would have in coming up with the necessary cash and shipping capacity – but without imposing a de jure prohibition. This policy too was a tentative one, programmed to expire in May 1939.

This cash-and-carry plan offered some modest satisfaction to both the "new neutrality" and the traditional-neutrality groups – while at the same time being deficient as well in the eyes of both. (To the collective-security advocates, it had no virtues.) It was at least a gesture in the direction of the "new neutrality," since it was carefully designed to avoid placing the United States in the position of asserting neutral rights against belligerents. But it stopped short of being a complete embargo. To the traditional-neutrality partisans, it had the virtue of being even-handed on its face – but also the vice of being a surrender of the traditional right to carry goods to belligerents.

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67 Neutrality Act, Feb. 29, 1936, chap. 106, 49 Stat. 1152.

The cash-and-carry policy was bedevilled, however, by the consideration that virtually any neutral policy, even if even-handed on its face, would, in practice, impact upon the belligerents in differing ways. James Wilford Garner warned that cash-and-carry would "operate in practice with the grossest inequality as between the opposing belligerents."[68] In particular, it would operate in favour of a belligerent which possessed substantial wealth of its own, plus a merchant marine, to the detriment of a poorer or landlocked states or a state without a substantial fishing fleet. More specifically, at the very time of enactment, the cash-and-carry policy would operate in favour of Japan and against China in the war which had just broken out in the Far East. In a European war, however, it would be a different story. Because of British domination of the seas and its general mercantile strength, it would be well placed to benefit from a cash-and-carry policy, at the expense of Germany.

Much the same could be said of an automatic and impartial arms embargo. It appears, on its face, to be an entirely even-handed policy. But in practice, that would not be so. A wealthy state which was planning an aggressive attack would carefully stockpile arms imported prior to the war – possessing the key advantage of controlling when the embargo would take effect. Once the war was in train, it would be too late for the victim country to follow suit. On this same reasoning, an apparently even-handed arms embargo would, in reality, work in favour of a belligerent which possessed a substantial domestic arms industry and against a state which did not.

The Roosevelt administration took some steps to mitigate these effects. Regarding the war in the Far East – and fully aware that a cash-and-carry policy would favour Japan over China – President Roosevelt took the remarkable step, or rather non-step, of pointedly declining to proclaim the existence of a war. Consequently, the cash-and-carry policy was not applied. This step (or non-step) was actually heartening from the standpoint of the collective-security supporters, who were particularly aghast that the United States might adopt a policy that blatantly favoured an aggressor over a victim. But it gives rise to doubts as to what the United States's neutrality policy actually was.[69]

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[68] James Wilford Garner, "The United States Neutrality Act of 1937," 31 Am. J. Int'l L. 385-97 (1937), at 388.

[69] See Divine, Illusion of Neutrality, at 200-19.

Collective security in action

When the Second World War actually broke out in 1939, the result was a sharp change in the neutrality policy of the United States, in the direction of the collective-security position. Since the conflict had been inaugurated by one of history's clearest instances of aggression, there was no real pretence that that the United States was actually neutral in the contest, in the traditional sense of being truly indifferent as to the outcome. Instead, it was "non-belligerent." Cooperation with the Allied side was the order of the day virtually from the outset. An early sign was the altering of the neutrality legislation, in November 1939, to discard the mandatory arms embargo. It was replaced not with a discriminatory arms embargo, as the collective-security proponents would have preferred, but instead with a rough and ready substitute: a cash-and-carry policy.[70] As noted above, a cash-and-carry policy operated in practice – and was fully intended to operate – in favour of France and Britain, to the detriment of Germany. As such, it was clearly directed against the aggressor state in the war.

There were great misgivings as to both the wisdom and legality of taking that step, during the hostilities, on the ground that it would obvious to all that the purpose was to enable the United States to assist the Allies. Interestingly, Jessup opposed the change.[71] His collective-security mindset envisaged establishing an essentially permanent and fixed policy of favouring peace-loving states against aggressors. But to institute such a policy on an ad hoc basis, clearly directed against a particular side in a particular war, was another matter – and a riskier one, as it would inevitably spark hostile feelings in the disfavoured state. If the United States wished to take the Allied side, Jessup contended, it should do so "boldly and frankly" by entering into the war, rather than adopting so transparently thin a disguise as a neutral.

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70 Neutrality Act, Nov. 4, 1939, chap. 2, 54 Stat. 4.

71 See Philip C. Jessup and Charles Cheney Hyde, "Lifting Arms Ban Now Is Held Unlawful," N.Y. Times, Sep. 21, 1939, at 17, col. 6.

A further important step was taken in September 1940, when the United States agreed to transfer naval destroyers to Britain in exchange for long-term leases of naval and air bases.[72] Even more striking was the lend-lease programme of 1941, which provided for systematic and continuing assistance to the Allied side.[73] Well before its own entry into the conflict in December 1941, the United States was openly functioning as "the arsenal of democracy."

This policy of "non-belligerency," or open favouritism towards the Allied side, was not without its critics. Foremost among them, of course, were the advocates of traditional neutrality. Led by Borchard, they denounced the American policy as amounting to a deliberate, systematic, large-scale campaign of international law-breaking. The concept of "non-belligerency," he objected, "has no legal status. It is apparently designed to justify breaches of neutrality or acts of war, perhaps with the hope that they will not result in a state of war."[74] In the event, the "non-belligerency" policy was brought to an abrupt end not by a snapping of German patience, as in 1917, but instead by the Japanese attack on Pearl Harbor. For the next four year, neutrality issues were off of the American agenda.

Conclusion

It would be pleasing to report the outcome of this vigorous three-way debate over neutrality which took place in the inter-war period – i.e., to record either the triumph of one of the three or the superseding of all of them by the forward march of history. That is not possible. It cannot be said that any of the three achieved a knock-out blow against the other two, either at the hands of United States legislators or World Court judges. And neither has the debate been relegated to history shelves of dusty libraries, to serve as a tasty (if thin) gruel for pedants. The issues continue to be alive and in evidence – to those with eyes sufficiently trained to see -- to the present day.

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72 Great Britain-U.S.A., Leasing of Naval and Air Bases, Sep. 2, 1940, 12 Charles I. Bevins, Treaties and Other International Agreements of the United States (Dept of State Pub. 8761, 1974) 551.

73 Act of Mar. 11, 1941, chap. 11, 55 Stat. 31.

74 Borchard, "Attorney General's Opinion," at 697.

In a certain sense, the collective-security perspective may be said to be the predominant one today, in that it has been enshrined in the UN Charter. It is most clearly evident in article 2(5) of the Charter, which requires UN member states to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." That is to say, that in cases of UN enforcement action, in which an aggressor state has been formally identified, neutrality is not an option. The problem is that there are many cases of armed conflict in which the UN has failed to take a definite position. In such cases, neutrality remains possible.

But is the neutrality in question the traditional or the "new" variety? The answer is that it has been both. In the Iran-Iraq conflict of 1980-88, a number of countries explicitly declared themselves to be neutral – and insisted on respect for their rights as neutrals by the contending parties, in ways familiar from past centuries. But "new neutrality" outlook has been evident also, in its signature form of mandatory arms embargoes, which continue to attract criticism for impacting on victims as well as on aggressors. Controversy on this point was especially vigorous in the case of the Bosnian civil war of 1992-95.

It has been noted that the fundamental three-fold division of view on neutrality did not arise in the 1930s. Rather, it emerged in the second half of the Eighteenth Century. The contentions of the 1930s were merely the latest twist in that earlier debate. Are the rights of neutrals (so-called) best seen as merely the residue of the normal rights of states after the belligerents have had resort to the principle of necessity? Or do those rights comprise a more or less fixed list, transgression of which is simply unlawful? Or are those rights merely a relic or artifact of a by-gone age of anarchy, which the world is committed to ending? It is a potent – if also sobering – tribute to the three pioneers of the Eighteenth Century that we are still struggling with the questions that they raised. Our present-day struggles may not be so public, or so vigorous, or so eloquent as those of the 1930s. But they are very much with us still.